No. 18,675

United States Court of Appeals

For the Ninth Circuit

American Casualty Company of Reading, Pennsylvania, and General Reinsurance Corporation,

Appellants,

vs.

Idaho First National Bank, Executor of the Estate of V. A. Roberts, Deceased, and Ellen M. Roberts,

Appellees.

APPELLEES' BRIEF

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STATEMENT RE JURISDICTION
(Rule 18(b) 9th Cir.)

Pleadings and admissions in this case, as established by Pre-Trial Order, establish jurisdiction in the United States District Court for the District of Idaho, Southern Division, pursuant to 28 U.S.C.A. 1322 (Tr. pages 4-5, 30-32), as follows:

A. Diversity of Citizenship.

Plaintiffs: American Casualty Company organized and having its principal place of business in the State of Pennsylvania.

General Reinsurance Corporation, organized and having its principal place of business in the State of New York.

Defendants: V. A. Roberts, citizen of the State of Idaho.

Ellen M. Roberts, citizen of the State of Idaho.

V. O. Stringfellow, citizen of the State of Washington, filing general appearance in this action.

Burl A. Johnson, citizen of the State of Oklahoma, filing general appearance in this action.

Darleen M. Johnson, citizen of the State of Oklahoma, filing general appearance in this action.

B. Amount in controversy, exclusive of interest and costs, exceeds $10,000.00.

Service was not made upon named defendants, K. H. Vitt or Catherine Vitt and judgment has not been rendered against them.

C. Appeal.

This appeal is from final judgment of the United States District Court for the District of Idaho, Southern Division (Tr. pages 92-96), and is appealable pursuant to the provisions of 28 U.S.C.A. 1291.

STATEMENT OF THE CASE

Appellees feel that the factual recitation set forth in appellant's brief does not contain all of the important facts of the case or more particularly, those which obviously motivated the trial court in granting appellees substantial relief. They feel therefore, that a restatement of the case is in order. Parties will be referred to by their names.

On September 6, 1958, V. O. Stringfellow, K. H. Vitt and Burl A. Johnson entered into a written joint venture agreement for the purpose of submitting bid upon a Capehart housing project to be constructed for the United States Department of the Air Force at Amarillo Airforce Base, Amarillo, Texas (Tr. p. 34; Plfs. Ex. 1(A)). Pursuant to government specifications, the joint venturers sought bonding requirements from plaintiff American Casualty Company (Tr. p. 34), hereinafter referred to as American. American would not bond the joint venturers without indemnification from a third party and the joint venturers sought assistance in this regard from V. A. Roberts, a resident of Boise, Idaho, who had furnished similar indemnification for some of the joint venturers on previous projects (Tr. pp. 34-36). Normal fee for such indemnification was 1% of the contract price and for indemnification furnished in this instance defendant Roberts was subsequently so paid (Tr. p. 36; Plfs. Ex. 1).

In August of 1958 the joint venturers, in contemplation of the written agreement to be executed between them, had submitted a bid on the project. In

order for this bid to be considered, it was necessary they furnish the government a commitment on the bonding requirements and in turn, it was necessary that American have a commitment from Roberts on the indemnification. A letter (Defs. Ex. 3; Tr. p. 35), was furnished American by Roberts under date of August 28, 1958, wherein he advised American that upon receipt and verification of financial statements of the joint venturers and upon each of the joint venturers assigning their assets to him as collateral security he would indemnify American in the aggregate sum of $7,700,000.00 and would execute an indemnity agreement on terms identical to one previously executed on another (Fort Huachuca) housing project. This was merely a commitment letter to enable the contract to be signed and the project commenced (Cromwell Dep., pp. 32, 33). However, Roberts made it entirely clear that the joint venturers' assets would have to be available to him for his protection (Defs. Ex. 3), and his attorney, Fred Cromwell, also made it clear to one Baxter, American's agent (Cromwell Dep., p. 7), that these assets of the joint venturers would have to be available for Roberts' protection (Cromwell Dep., p. 33).

To satisfy Roberts that this would be so, American's agent, Baxter, procured from the joint venturers a telegram confirming this requirement on Roberts' part (Tr. p. 35; Cromwell Dep., pp. 33, 34). Roberts had refused to agree to the indemnification until he was assured of the security of the joint venturers' assets and upon receipt of the telegram felt the assets were

to be secured to him and on this understanding agreed to the indemnification (Cromwell Dep., pp. 34, 35, 42). American accepted his indemnification on this basis (Plfs. Ex. 1; Defs. Ex. 3). Roberts also submitted to American a financial statement (Plfs. Ex. 4) listing assets subject to his indemnity, all of which were the community assets of he and his wife.

Cromwell then prepared the indemnity agreement (Ex. 1 with attachments) and the agreement was executed by the joint venturers, Roberts et ux and American (Tr. p. 36). Its validity and execution are admitted. Attached to Exhibit 1, and a part thereof, are various other documents, most important of which are the bond applications and indemnifications executed by the joint venturers (Plfs. Ex. 1 (D,E,F)). All of the terms of the various bond applications are, by the terms of the indemnity agreement, deemed for the benefit and protection of defendants Roberts. Under paragraph 3 of the bond applications, as well as by the indemnity agreement itself, the joint venturers agree to indemnify against any and all liability, etc. and under section 15(a) further agree to post additional collateral security.

The indemnity agreement, Ex. 1, further provides, on page 6 thereof, that defendants Roberts are subrogated to all rights of American.

Following execution of Ex. 1, American, in the fall of 1958, issued the bonds required by the government and the joint venturers commenced construction of the housing project at Amarillo (Tr. pp. 35-36).

These same joint venturers thereafter, and while the Amarillo project was under construction, in June 1959, (Tr. p. 38) contracted to build a similar housing project for the government at Whidbey Island in the State of Washington. This project will hereinafter be referred to as Whidbey Island. American also executed the performance bonds for the joint venturers on Whidbey Island (Tr. p. 38). However, there was one important difference in this execution: On Whidbey Island, through some inadvertence within the company itself, American failed to obtain a third party indemnitor (Bennett Dep., p. 9; Cromwell Dep., pp. 19, 37) and in the course of subsequent events, American knew that if any losses could conceivably occur at Widbey Island they would be American's losses only, whereas American had defendants Roberts as indemnitors on Amarillo losses (Bennett Dep., p. 23).

On or about September 23, 1959, the joint venturers gave notice to American that they would be unable to complete the Amarillo project without financial assistance (Tr. p. 37). American, through its agent Bennett, notified defendants V. A. and Ellen Roberts of the anticipated default of the joint venturers (Plfs. Ex. 5 and 6). Bennett in his letter advised Roberts and his wife that the apparent loss on the Amarillo project would be between $600,000.00 and $700,000.00 and called upon Roberts and his wife to take whatever steps necessary, as indemnitors, to save American from loss or expense as the result of deficit operations (Plfs. Ex. 5 and 6).

Upon receipt of this notification from Bennett, Roberts requested his attorney, Cromwell, and an engineer, Paul Wise, to go to Amarillo and appraise the situation there existing. They met Bennett at Amarillo (Cromwell Dep., pp. 10-12; Bennett Dep., pp. 4-5; Wise Dep., pp. 3-4). Bennett was the agent of American (Bennett Dep., p. 4) and at all times had apparent authority to and did, then and thereafter, act for American (Wise Dep., p. 20; Cromwell Dep., p. 30; Bennett Dep., pp. 4, 23, 24).

The trip to Amarillo made by Wise and Cromwell was primarily a fact-finding trip (Cromwell Dep., p. 10). Cromwell and Wise returned to Boise and on October 4, 1959, met at the Roberts' home with Roberts, Bennett, and K. H. Vitt, one of the joint venturers (Cromwell Dep., pp. 15, 16; Bennett Dep., pp. 5, 6; Wise Dep., pp. 8-10). Roberts was in obvious poor health (Wise Dep., pp. 8, 9; Cromwell Dep., p. 23) and it was quite apparent to Bennett that Roberts was not physically capable of taking over the Amarillo project or personally seeing to its completion (Bennett Dep., p. 15; Wise Dep., p. 15). Roberts subsequently died November 12, 1961, and The Idaho First National Bank was substituted as a defendant herein.

It was quite apparent also that Roberts was not financially able to take over the project and that the bonding company would have to do so (Bennett Dep., pp. 14, 15, 28, 49, 50; Cromwell Dep., pp. 17, 18; Wise Dep., pp. 15, 16). On this specific premise Roberts and Bennett discussed the bonding company taking

over the job under a joint control agreement with the joint venturers (Cromwell Dep., p. 18; Wise Dep., p. 11; Bennett Dep., pp. 15, 18). The parties discussed the Amarillo situation generally, the losses, which were known at that time to exceed $600,000.00, and the probability of recouping these losses from anticipated profits on Whidbey Island plus application of assets of the joint venturers (Wise Dep., pp. 9, 10, 21; Cromwell Dep., pp. 20, 21, 22, 27, 28, 35, 36, 37, 38, 39 and 40; Bennett Dep., pp. 7, 10, 12). Bennett knew that American was in the Amarillo job to see to its completion and the only losses under discussion at the meeting were the losses on the Amarillo project (Bennett Dep., p. 16; Cromwell Dep., p. 21; Wise Dep., p. 22). All parties assumed, on Vitt's estimate, that Whidbey Island anticipated a profit which would go a long way to pay off the Amarillo losses (Wise Dep., pp. 11, 17 and 22; Cromwell Dep., pp. 19, 22, 35, 36; Bennett Dep., p. 10). Neither Bennett nor anyone else had any losses in mind other than Amarillo losses during all of the discussions pertaining to possible loses (Bennett Dep., pp. 16 and 17).

Roberts stated his understanding of the situation was that his liability would attach only to those losses which exceeded application of the Whidbey Island profits and the joint venturers' assets (Wise Dep., pp. 10, 11, 13, 17). Cromwell made it clear that the joint venturers' assets should be applied to the Amarillo losses before any liability accrued to Roberts and Bennett evidenced concurrence therein (Cromwell Dep., pp. 20, 21, 22, 27, 28; Wise Dep., p. 19). It was

the definite understanding and conclusion from the meeting that the assets of the joint venturers stood between Roberts and any loss at Amarillo and Bennett concurred in this understanding (Cromwell Dep., pp. 22, 35, 37, 38, 40; Wise Dep., pp. 18, 19). From the conversations it was understood that Bennett would immediately go to Seattle to check Whidbey Island and look into the joint venturers' assets, with the thought of marshaling the same to off-set loses at Amarillo and that he would also set up a joint control on the Amarillo project between the joint venturers and American (Wise Dep., p. 14; Cromwell Dep., pp. 36, 39). All of the discussions were with regard to the Amarillo losses and the possible liability of Roberts and it was the general consensus of all present at the meeting that the likelihood of a loss to either Roberts or American was remote since the Whidbey Island profits and assets of the joint venturers appeared to be such that Amarillo losses would be completely off-set thereby (Cromwell Dep., pp. 35, 36; Bennett Dep., pp. 10, 74; Wise Dep., pp. 17, 18, 22).

By his own testimony Bennett admitted that the general tenor of the conversation, after it became evident that Roberts could not physically or financially take over the job, was that American would step into the Amarillo project and marshal assets of the joint venturers as collateral security to off-set the losses (Bennett Dep., p. 29).

Following the meeting at Roberts' home, Bennett went to Seattle with Vitt. In Seattle he checked on Whidbey Island which appeared to be financially

stable and employed one Harold Willets to represent American as its attorney in Seattle (Bennett Dep., p. 53). Vitt owned various apartment houses in Seattle as well as in Idaho and Montana, all of which were available as collateral security (Bennett Dep., p. 20; Wise Dep., pp. 21-22). A pledge agreement was prepared by American's attorney, Willets, (Bennett Dep., pp. 21 and 53) and presented to Vitt for execution but the agreement, as prepared by Willets, (Defs. Ex. 9) pledged these assets to American to cover *first,* any losses which *might* occur on Whidbey Island and secondly, the Amarillo losses. Bennett acknowledged that the agreement was thus drafted by American purposely to protect itself on Whidbey Island since American had no independent indemnitor there as it did on the Amarillo losses (Bennett Dep., pp. 22, 23, 24, 68, 69, 74) and by so doing, American fully intended to prevent Roberts from having these assets applied first as off-sets on the Amarillo losses (Bennett Dep., p. 68).

Roberts, of course, was not consulted with regard to the terms or effect of this pledge agreement (Bennett Dep., pp. 24, 74). The first knowledge he had thereof was on October 14, 1959, when Bennett met with Roberts' attorneys in Boise and gave them copies of the Amarillo joint control agreement dated October 13 (Plfs. Ex. 7), the Whidbey Island joint control agreement dated October 11 (Defs. Ex. 8) and the pledge agreement (Defs. Ex. 9) (Bennett Dep., p. 27). Amarillo losses were known at this time to be in excess of $600,000.00 while Whidbey Island still

anticipated a profit. No losses were then contemplated at Whidbey Island, in fact, at a meeting between Bennett and Roberts' attorneys as late as July 15, 1960, when the Amarillo losses had climbed to almost a million dollars, it was still contemplated by American that Whidbey Island would show a profit of between $100,000.00 and $300,000.00 (Bennett Dep., pp. 36, 37 and 38).

Eugene Anderson, one of Robert's attorneys, immediately following the meeting with Bennett in Boise on October 14, 1959, telephoned Harold Willets, American's attorney in Seattle, and objected to the application of Vitt assets to Whidbey Island as set forth in the pledge agreement (Bennett Dep., p. 58). He also wrote to Willets the same day (Defs. Ex. 10), again outlining this objection.

The parties have agreed, during the course of this litigation, that the net and liquidated value of the Vitt assets secured by American under the pledge agreement is $350,000.00. This agreement is the basis of that figure allowed as a set-off.

Only toward the end of 1960, almost a full year after the pledge agreement, did it become apparent that the Whidbey Island profits were vanishing and that Whidbey Island might sustain a loss (Bennett Dep., pp. 75, 76). These losses have ultimately exceeded $600,000.00 (Bennett Dep., p. 59).

While the amended complaint of plaintiffs is the basis upon which this cause was submitted to the trial

court and the original complaint is not part of this record on appeal, the original complaint filed April 1, 1960, sought only a total sum of $666,443.28 broken down into $580,102.72 already expended, $86,340.56 additional claims known of and there was included a general allegation that there would be further claims as well as costs, fees and expenses (Appendix A). The amended complaint was filed February 27, 1961 (Tr. p. 4) wherein the additional sums incurred were increased from $86,340.56 to $432,090.52 (Tr. p. 13), and a figure of $82,001.85 was asserted to have been paid for expenses (Tr. p. 14). The total amount of the prayer was thus increased from $666,443.28 to $1,094,195.09 (Tr. p. 18).

Defendants Roberts, by their answer (Tr. p. 22, par. 6) denied the losses claimed by American and affirmatively asserted that American had failed to obtain, or had obtained and failed to apply against losses, various assets of other defendants, by reason whereof defendants Roberts should be relieved of all obligation under the indemnity agreement or, alternatively, should be relieved of obligation at least to the extent of the assets misappropriated. By its pretrial order, the court included therein the contentions of parties (Tr. p. 40). The contentions of defendants Roberts (Tr. pp. 44-54) reiterated and amplified these defenses to the claim of the plaintiffs and furthermore, defendants Roberts offered to return, and tendered (Tr. p. 53), the $75,791.46 paid them for their indemnity. These contentions and tender were filed September 29, 1961 (Tr. p. 44).

During the course of litigation, on June 13, 1961, attorneys for plaintiffs, defendants Roberts and Johnson and defendant Vitt personally, all signed an agreement (Appendix B) which was the culmination of several days in Amarillo examining, in conjunction with accountants, the claimed expenses of American. It is quite clear therefrom that the amount finally agreed to as being properly expended by American was less than the amount claimed by American. This agreement resulted in a stipulation to the court concerning proof of the amount involved (Tr. p. 32), although defendants reserved their defenses of non-liability or set-off. As shown in the agreement (Appendix B) the parties agreed, following their own examination of the records, that plaintiff's claim totaled, without further proof as to necessity or amount, $1,025,868.63 together with a contingent claim which could increase the amount by $23,500.00. The contingency thereafter arose and in June 1962, the parties stipulated that fact to the court, which resulted in the court's order amending pre-trial order (Tr. p. 60). The pre-trial order (Tr. p. 32) reflects that correction in amount. Thus, it was not until June 15, 1962, that the final amount totaling $1,049,218.63 was arrived at.

The parties submitted the case upon the written record, various stipulations and the depositions. On February 11, 1963, the court filed its memorandum opinion (Appendix C). This opinion actually contained findings but nevertheless additional findings were prepared by appellants' counsel and submitted to the court at the court's request.

In addition to granting relief to these defendants to the extent of a set-off of $350,000.00, being the value of the Vitt securities, the court also granted these defendants another $30,000.00 set-off and made provision for application of other sums if and when recovered. Interest was allowed on the final amount so determined only from date of judgment (Tr. pp. 92-96). American appeals from that portion of the judgment awarding the $350,000.00 off-set and granting interest only from the date of judgment.

During the course of litigation, defendants Stringfellow and Johnson, et ux, stipulated that judgment be entered against them and in favor of appellants for the amount of $1,049,218.63 (Tr. p. 74). This was the amount set forth in the pre-trial order pursuant to order of the court (Tr. p. 60) following agreement of the parties, and no interest whatsoever was sought or recovered by appellants against these other defendants.

The only issues raised by this appeal are:

1. Are appellants entitled to interest prior to date of judgment and if so, from when and on what amount? and,

2. Did the court err in allowing appellees a set-off of $350,000.00, being the value of the Vitt assets?

ARGUMENT

INTEREST WAS PROPERLY ALLOWED FROM DATE OF JUDGMENT.

Appellants seek a determination in this court that interest on the final amount found due them should be computed at least from April 1, 1960, which was the date the original complaint in this case was filed. Perhaps a chronological history of appellants' claimed expenditures would be helpful.

At the time of filing the original complaint, April 1, 1960, appellants sought a total of $666,443.28, indicating, additionally, further sums would be expended in the future (Appendix A). On February 27, 1961, (Tr. p. 4) appellants filed an amended complaint wherein the total amount then sought to be recovered was increased to $1,094,195.09 (Tr. p. 18).

In June 1961 counsel for the parties went to Amarillo, Texas, and spent two days, in conjunction with accountants, examining appellants' accounts in order to arrive at some determination of how much money appellants had properly and necessarily expended to complete the project. These sums obviously were not ascertained nor ascertainable by simple computation unless, of course, we take the position, as appellants apparently do, that all that had to be done was to total up their expense vouchers. These examinations culminated in an agreement (Appendix B) dated June 13, 1961, which in turn resulted in the court's pre-trial order setting forth that appellants had reasonably expended a total sum of $1,025,868.63 with a contingency of an additional $23,350.00. The pre-trial

order in the transcript (Tr. p. 32) sets forth a total sum of $1,049,218.63 but this figure is an amendment reflected by order of the court dated June 14, 1962, (Tr. pp. 60, 61) following appellants' payment, in June 1962, of the contingent $23,350.00. Appellants' contentions (Tr. p. 42) confirm the amounts above stated.

Thus, appellants sought by their initial complaint to recover approximately $666,000.00. They sought by their amended complaint to recover approximately $1,094,000.00. At all times until the agreement (Appendix B) appellees disputed both the reasonableness and the amount of appellants' claims. The agreement (Appendix B) acknowledges there were disputes as to certain claimed expenditures and approximately $70,000.00 of claimed expenditures were deleted from appellants' claims. Between April 1960, when the original complaint was filed and February, 1961, when the amended complaint was filed, appellants continued to expend additional sums and as late as June 1962, spent an additional $23,350.00.

At no time, at least until the agreement of June 13, 1961, were the expenditures of appellants ascertained and at no time until the judgment in this case was it determined legally that appellees were obligated to pay none, all, or any portion thereof.

Appellants seek interest on the final amount found due by the court from April 1, 1960. At that time they had in their possession the value of $380,000.00 in securities which the court determined should be

off-set from appellees' liability. The most they were entitled to on that date therefore would have been approximately $286,000.00 and from this there should even be deducted such portion of the $70,000.00 disallowed by the agreement (Appendix B) as had been incurred up to that time. Appellants seek also to recover interest on moneys they had not even expended at that date but were continually expending thereafter.

Appellants, in support of their position, rely primarily on the Idaho cases of *Hendricks v. Goldridge Mines, Inc.,* 56 Idaho 325, 54 Pac. 2d 254, and *Guyman v. Anderson,* 75 Idaho 294, 271 Pac. 2d 1020.

In both of these actions plaintiff sought to enforce a mechanic's lien. In each, the money was due directly under an agreement, either express or implied, to pay for the work performed.

In *Guyman* there was no question that the laborer had performed the work or that the property owner had expressly or impliedly agreed to pay therefor. The only question was the amount due and the Idaho court held that since this amount could be fixed by a recognized standard, interest was allowed.

Likewise, in *Hendricks* there was no question of the money being due directly on the agreement to perform the work. Since there were payments and off-sets involved, the Idaho court held the account to be in the nature of an "open account" with interest accruing three months following the last debit item (Idaho Code, 27-1904(7)).

In the instant case no money is due appellants by the terms of Exhibit 1. By that document itself, appellees owed no sums whatsoever. Idaho Code, 27-1904(1) would not seem to be applicable. Appellees merely agreed to indemnify appellants against possible future losses which *might* arise and certainly were not known or stated at that time. Thus, while the basis for liability is founded in the agreement, the money became due in the future upon the happening of certain contingencies or events and the money became due not by reason of the mere contract but by reason of the losses which were subsequently incurred. Idaho Code, 27-1904(1) more logically contemplates a contract wherein the payment of a stated sum of money is specifically provided for, as for instance, in the case of a promissory note, a purchase contract, an agreement to perform work for a fixed consideration, and the like.

Idaho Code, 27-1904(2), if applicable, would logically have reference to the date of judgment since the amount ultimately found due was not determined until the date of the judgment nor was appellees' liability to pay any portion thereof fixed until date of judgment.

The most that could be said is that because of the continuing expenditures by appellants, the moneys debited to the account of appellees were in the nature of an open account, as in the *Hendricks* case, and no interest would be due and owing until three months following the date of the last debit item which was in June 1962.

Appellees, of course, set out defenses to their claimed liability. They also denied the reasonableness and necessity of the claimed expenditures by appellants, $70,000.00 of which were disallowed by agreement (Appendix B). As pointed out in *Lundgren v. Freeman,* 9th Circuit 1962, 307 Fed. 2d 104, 111, where there are cross demands and defenses, some of which were allowed and some were not, it cannot be fairly said that the net amount ultimately due was ascertained or ascertainable until the award had been made. This position is supported in *Donaldson v. Josephson,* 71 Idaho 207, 228 Pac. 2d 941, wherein the Idaho court held that where there are mutual claims between the parties, made up of items of claims and set-offs, payment of interest commences from the date the accounting is ascertained, which in the instant case would be the date of the judgment.

Thus, the amount properly expended by appellants over a period of late 1959 to June 1962 was not ascertainable by simple computation nor at all until the stipulation which resulted in the court order (Tr. pp. 60, 61) and even then, appellants' liability for payment of any portion of that amount was not ascertained or capable of ascertainment until submission of the cause to the court and the court's judgment of March 28, 1963.

It should be noted that in the judgments entered against defendants Stringfellow and Johnson, pursuant to stipulation and agreement, no interest was awarded nor, in the stipuation, was any such interest sought by appellants. Why should interest be awarded

against appellees and none be awarded against other defendants?

Appellees feel therefore that the allowance of interest only from the date of the judgment was entirely proper and that any award of interest from April 1, 1960, as sought by appellants would amount to the granting to them of interest on moneys not even expended by them at the time.

ULTIMATE DECISION OF THE TRIAL COURT THAT APPELLEES WERE ENTITLED TO A $350,000.00 SET-OFF IS AMPLY SUPPORTED BY EQUITABLE AND LEGAL THEORIES AS APPLIED TO ACTUAL FACTS IN THIS CASE.

Unfortunately, the findings in this case, as prepared by appellants' counsel and adopted by the court, are meager in statement of facts which the court obviously found to exist and which warranted granting of the set-off to appellees. The statement in paragraph XII of the findings (Tr. p. 72) "That on or about October 4 said W. H. Bennett and K. H. Vitt met with defendants Roberts and Cromwell and Wise in the home of the defendants Roberts, Boise, Idaho, wherein further conversations were had, concerning the loss at Amarillo." has reference to the facts upon which the court's decision is predicated but does not set these facts out with sufficient detail or clarity. Reference must therefore be had to the actual evidence in the case.

While appellees recovered judgment in the District Court, appellees were granted a substantial off-set.

It is appellants who feel aggrieved by the judgment and have appealed therefrom. Appellees are therefore, in a practical sense, the prevailing parties in this case and this court should take that view of the evidence most favorable to the court's decision allowing the set-off (*Los Angeles Shipbuilding and Dry Dock Corp. v. U.S.,* 289 Fed. 2d 222; *Zimmerman v. Montour R. Co.,* 296 Fed. 2d 97, cert. den., 369 U.S. 828, 7 L. Ed. 2d 793).

Findings of the trial court must be sustained unless clearly erroneous (FRCP, Rule 52(a); *Los Angeles Shipbuilding and Dry Dock Corp. v. U.S.,* supra), therefore, the decision of the District Court on matters of fact should not be disturbed if supported by some evidence, even though conflicting.

The trial court's memorandum opinion may be useful to provide a more ample understanding of the issues before the court. It is set out herein as Appendix C. Its use on this appeal is not precluded and indeed may be used to supplement otherwise inadequate findings of fact (*American Pipe and Steel Corp. v. Firestone Tire and Rubber Co.,* 292 Fed. 2d 640).

Let us then examine the evidence which motivated the court in granting the $350,000.00 set-off to appellees.

When Roberts initially agreed to the indemnification, it was on the express condition that he be protected to the extent of the assets of the joint venturers. This was made clear in his commitment letter (Defs. Ex. 3; Tr. p. 35) and his attorney, Fred Cromwell,

also made this condition known to American's agent, Baxter (Cromwell Dep., pp. 7 and 33). American accepted Roberts' indemnification with full knowledge of this requirement and obviously acquiesced therein, in fact, to satisfy Roberts that the assets of the joint venturers would be available for his protection, Baxter had the joint venturers send Roberts a telegram confirming this requirement (Tr. p. 35; Cromwell Dep., pp. 33-35). While admittedly this telegram, by its technical terms, may not have constituted a valid assignment, Roberts obviously felt that at least all parties were in agreement that he was to be secured to the extent of the joint venturers' assets and he therefore executed the indemnity agreement with that understanding (Cromwell Dep., pp. 34-35) and American accepted his indemnity with that understanding.

The separate indemnification agreements of the joint venturers, attached to Plaintiffs' Exhibit 1 as attachments D, E and F were, by the terms of Exhibit 1, deemed to be for the benefit and protection of Roberts and under paragraph 3 of these bond applications, as well as by the indemnity agreement itself, the joint venturers agreed to indemnify against any loss. Further, under section 15(a) thereof, they agreed to furnish additional collateral security if necessary. By the terms of Exhibit 1 these agreements were deemed to be for the protection and benefit of Roberts and on page 6 of Exhibit 1, defendants Roberts were specifically subrogated to all rights of American.

The Amarillo project was commenced in 1958. Following its commencement, and in June 1959 (Tr. p.

38) these same joint venturers contracted to build a similar project for the government at Whidbey Island in the State of Washington. American also executed the bonds for these joint venturers on the Whidbey Island project (Tr. p. 38). Roberts had no connection with the Whidbey Island project. Through some inadvertence within the company, American neglected or failed to obtain a third party indemnitor on its Whidbey Island bonds (Bennett Dep., p. 9; Cromwell Dep., pp. 19, 37). This becomes considerably important since in the subsequent course of events American well knew, after the Amarillo project became financially unstable, that if these same joint venturers ran into trouble on Whidbey Island, any losses incurred there would have to be sustained by American only whereas American could fall back on Roberts for indemnification of Amarillo losses (Bennett Dep., p. 23).

On September 23, 1959, when the joint venturers gave notice to American of their need for financial assistance in order to complete the Amarillo project it was thought that Amarillo losses would approximate $600,000.00 to $700,000.00 (Plfs. Exs. 5 and 6).

Roberts immediately dispatched to the scene of the project his attorney and an independent engineer and contractor, one Paul Wise. These two met with American's agent, Bennett, at Amarillo (Cromwell Dep., pp. 10-12; Bennett Dep., pp. 4, 5; Wise Dep., pp. 3, 4). Cromwell and Wise went to Amarillo primarily to merely appraise the situation and report back to Roberts (Cromwell Dep., p. 10). They returned to Boise and on October 4, 1959, met at the Roberts home with

Roberts, Bennett and K. H. Vitt, one of the joint venturers (Cromwell Dep., pp. 15, 16; Bennett Dep., pp. 5, 6; Wise Dep., pp. 8-10). Roberts was in very poor health (Wise Dep., pp. 8, 9; Cromwell Dep., p. 23) and it was quite apparent even to Bennett that Roberts was not physically capable of taking over the Amarillo project or personally seeing to its completion (Bennett Dep., p. 15; Wise Dep., p. 15) and it was also obvious to Bennett that Roberts could not financially see to the completion of the project and that the bonding company would have to undertake the same (Bennett Dep., pp. 14, 15, 18, 28, 49, 50; Cromwell Dep., pp. 17, 18).

With this understanding the parties then discussed what could be done to protect Roberts from loss on his indemnification. They discussed the bonding company taking over the job under a joint control agreement with the joint venturers (Cromwell Dep., p. 18; Wise Dep., p. 11; Bennett Dep., pp. 15, 18) and considerable time was spent discussing the recoupment of losses from anticipated profits on Whidbey Island and application of assets of the joint venturers (Wise Dep., pp. 9, 10, 21; Cromwell Dep., pp. 20, 21, 22, 27, 28, 35-40; Bennett Dep., pp. 7, 10, 12). Vitt indicated that the Whidbey Island profits would go a long way to pay off the Amarillo losses (Wise Dep., pp. 11, 17, 22; Cromwell Dep., pp. 19, 22, 35, 36; Bennett Dep., p. 10).

Roberts clearly stated to Bennett that his understanding of the situation was that his liability under

the indemnity agreement would attach only to that amount of loss which exceeded application of the Whidbey Island profits and the joint venturers' assets (Wise Dep., pp. 10, 11, 13, 17) and Cromwell made it clear to Bennett that the joint venturers' assets should be applied to the Amarillo losses before any ultimate liability for repayment of loss accrued to Roberts (Cromwell Dep., pp. 20-22, 27-28; Wise Dep., p. 19). The parties, of course, were not at that time disputing Roberts' ultimate liability to repay American any unrecoverable losses but it was understood and agreed that American would take over the project, pay out its own money to complete the same and the repayment by Roberts was to be determined after off-setting these losses with Whidbey Island profits and joint venturers' assets. It was the definite understanding of all those at the meeting that the assets of the joint venturers stood between Roberts and his ultimate liability for losses at Amarillo (Cromwell Dep., pp. 22, 35, 37, 38, 40; Wise Dep., pp. 18-19). Bennett himself admitted this to be the case (Bennett Dep., p. 29):

> "Q. I am not talking about any specific agreements, I am just talking about your conversations and understandings. Certainly from the tenor of the whole conversation out there the idea was that the American Casualty Company would step in the Amarillo project, put up the money to complete it, and they would check the other joint venturers' assets and obtain whatever collateral security they could to offset losses; isn't that the tenor of the conversation?
>
> A. That was the general tenor of it, yes."

It should be borne in mind that there were no losses except Amarillo losses under discussion (Bennett Dep., pp. 16, 17; Tr. p. 38). In fact, profits were contemplated at Whidbey Island as off-sets to the Amarillo losses. All of the parties felt that with the application of Whidbey Island profits and the joint venturers' assets, the likelihood of ultimate loss to Roberts at Amarillo was remote (Cromwell Dep., pp. 35, 36; Bennett Dep., pp. 10, 74; Wise Dep., pp. 17, 18, 22). It was understood that immediately following the meeting Bennett would go to Seattle, check on Whidbey Island, set up a joint control agreement on the Amarillo project and look into the joint venturers' assets with the thought of marshaling the same to offset Amarillo losses (Wise Dep., p. 14; Cromwell Dep., pp. 36, 39).

Bennett did go to Seattle where he checked on the Whidbey Island project which appeared to be financially stable although it was moving more slowly than had been hoped (Bennett Dep., pp. 20, 38-41). He discussed with Vitt, Stringfellow and Johnson's attorney their various assets (Bennett Dep., pp. 19, 20). He also employed one Harold Willets to act as American's attorney (Bennett Dep., p. 53) and Willets drew the joint control agreements on Amarillo, Whidbey Island and the pledge agreement, Defs. Exs. 7, 8 and 9.

Appellants in their brief make mention of the fact that the Vitt assets were "voluntarily" pledged to American and Vitt could well choose to apply them to Whidbey Island losses if he wanted to. In the sense that no one put a gun to Vitt's head and said "Sign

or else'' his execution of the pledge agreement was voluntary. In the sense that Vitt had no choice but to sign, that the agreement was prepared by American's attorneys to suit American's own purposes and provided for application of the Vitt securities first to Whidbey Island losses and that this was done purposely by American to prevent Roberts from having those assets applied to Amarillo losses are facts which make appellants' claim of ''voluntary'' action on Vitt's part rather specious. This provision of the pledge agreement was not inserted therein by accident and Bennett testified that the manner in which the Vitt assets were to be applied had been discussd in almost daily contact with his office in Reading, Pennsylvania, and that he was actually instructed by the office to apply the Vitt assets to the Whidbey Island project first (Bennett Dep., p. 24). Any claim that Vitt had a right to pledge his assets for a purpose other than Roberts' protection at Amarillo violates the telegram (Tr. p. 35) and the provisions of Ex. 1 and its attachments D, E and F.

Nor was Roberts consulted with regard thereto (Bennett Dep., p. 24). Following the meeting at his home in Boise, on the basis of the discussions had thereat and the understanding resulting therefrom, Roberts undertook no further independent action to protect himself, on the knowledge that American would undertake whatever action was available to protect against the Amarillo losses. However, contrary to the understandings at Roberts' home, and upon directions from his superiors, and without con-

sulting or advising Roberts of what might be plainly termed a "double cross", Bennett secured the Vitt assets for American's purposes only. His testimony in this regard is as follows: (Bennett Dep., pp. 22, 23)

"Q. You were certainly acting to protect the American Casualty Company first because it had no independent indemnitor at Whidbey Island, weren't you?

A. I was acting to protect the American Casualty Company because I was employed by the American Casualty Company.

Q. All right, and because they had no independent indemnitor at Whidbey Island?

A. No, no independent indemnitor at Whidby Island.

Q. And that is why the Vitt pledge was made to secure any possible or contingent Whidby Island losses first, wasn't it?

A. I explained a few minutes ago there were several reasons for that.

Q. All right, but you did that primarily because you had no independent indemnitor on the Whidby Island project?

A. Not primarily; no, sir.

Q. Well, you knew that if any losses did occur at Whidby Island it was American Casualty's loss without any recourse to a third-party indemnitor?

A. That is correct.

Q. Whereas, at Amarillo you had Mr. Roberts as third-party indemnitor?

A. That is true.

Q. And you were acting on behalf of the American Casualty Company and you were securing their interest first?

A. That is correct."

Bennett Dep., p. 68:

"Q. I note here that you point out in your memorandum that: 'At this point it is well to mention that had we succeeded in getting the joint venturers to borrow money on their assets, we probably would not have been able to apply the proceeds of such assets to any loss other than the loss at Amarillo, whereas now we can first apply the proceeds to Whidby if we have a loss there and then to Amarillo.' That is in your memorandum?

A. That is correct.

Q. In other words, it was your feeling that by taking Vitt's securities as pledged which you did you could protect American Casualty if there were any possible losses at Whidby Island first and then Mr. Roberts wouldn't be able to force the application of those assets to the Amarillo lawsuit (losses) which were then known to have existed?

A. That is correct.

Q. That was done supposedly?

A. Yes, sir—well, subsequently after we had attempted to get Johnson, Stringfellow and Vitt all three to pool all their assets and throw into the kitty enough money to cover their known losses.

Q. But you did intend the pledge agreement from Vitt to apply first to Whidby Island and then to Amarillo?

A. That is correct.

Q. That wasn't done just by accident?

A. No, sir."

Only after American had obtained the pledge agreement, without consultation with Roberts, did Ameri-

can advise Roberts, through his attorneys, of the terms thereof (Bennett Dep., p. 27).

Eugene Anderson, one of Roberts' attorneys, immediately telephoned Harold Willets, American's attorney in Seattle, and objected to this misapplication of Vitt assets (Bennett Dep., p. 58). He also wrote to Willets the same day (Defs. Ex. 10) and again outlined these objections.

It should be recalled that the Amarillo losses were at this time known to exceed $600,000.00 while Whidbey Island was still anticipating a profit. In fact, at a meeting between Bennett and Roberts' attorneys as late as July 15, 1960, over six months later, at a time when Amarillo losses had climbed to almost one million dollars, it was still contemplated by American that a profit of between $100,000.00 and $300,000.00 would be realized from Whidbey Island (Bennett Dep., pp. 36-38), which under the terms of the Whidbey Island joint control agreement (Defs. Ex. 8) were to be applied as off-sets to Amarillo losses. Only toward the end of 1960, almost a full year after the pledge agreement, did it become apparent that Whidbey Island profits were vanishing and that losses might be sustained thereat (Bennett Dep., pp. 75, 76).

These then are the facts upon which the trial court made its ultimate determination that American Casualty Company was under an obligation to utilize the Vitt assets for the purpose of off-setting Amarillo losses and that these assets should have been so applied

rather than diverted by American to Whidbey Island losses.

Appellees asserted in their answer and raised as issues in the case the fact that American had obtained such assets and that the same should have been applied to Amarillo losses (Tr. p. 23). They further set out in their contentions the true facts of the case, the discussions at the Roberts' home and the understandings arrived thereat (Tr. pp. 44-54). These were a part of the pre-trial order (Tr. p. 40). They further asserted therein (Tr. p. 53) that American had breached its duty and agreement and had failed to act in good faith toward appellees, by reason whereof they should be absolved from any and all liability under the indemnity agreement, Exhibit 1.

Parties may assert any or all claims or defenses they may have. When equitable defenses are interposed, the maxims of equity cannot be disregarded and the court should grant all proper relief to which a party is entitled as disclosed by the facts in the case (FRCP, Rules 2, 54(c); Barron and Holtzoff, Fed. Prac. and Pro., Vol. 1, pp. 620, 622). In making its ultimate determination in this case the question before the trial court was not necessarily what specific relief did a party seek but rather what relief was he entitled to under the facts (Barron and Holtzoff, Vol. 3, pp. 35-37).

Appellees initially felt that he wrongful acts of appellants in misapplying the Vitt assets, to the obvious prejudice and increased risk of appellees, was such an act of bad faith and unconscionable dealing

as to absolve them from any liability under the indemnity agreement. With this the trial court did not entirely agree and absolved appellees from liability only to the extent of the set-offs allowed. That the set-off of $350,000.00 is just and proper under the facts of this case and under the general laws of estoppel and indemnification is without question.

The doctrine of equitable estoppel is founded on premises of morality and fair dealing and is intended to subserve the ends of justice (19 Am. Jur. 640, section 42). The law will not stand by in silence and see one party mislead another to his injury, whether by ignorance, negligence or design (*Tracey v. Standard Accident Ins. Corp.,* 109 Atl. 490). The doctrine holds a person to a representation made or a position affirmed where otherwise inequitable consequences would result to another, who, having the right to do so under all of the circumstances of the case, has in good faith relied thereon and been misled to his injury (19 Am. Jur. 642).

Neither actual fraud nor bad faith are generally considered essential elements in the application of the doctrine of equitable estoppel. In their absence fraud is construed from the result of the conduct intended or calculated or which might reasonably be expected to influence the conduct of the other party and mislead him to his prejudice. The fraud frequently is construed to arise from the subsequent attempt to contravert the conduct undertaken to the injury of one who has relied thereon (19 Am. Jur. 646, 647).

Thus, as applied to this case, at the meeting in the Roberts' home it was apparent to American's agent, Bennett, that Roberts was neither physically nor financially able to undertake the completion of the Amarillo project and that American would have to do so. It was also the general tenor of the discussions, in fact, the whole subject thereof, that American would take over the Amarillo project or at least see to its completion under a joint control agreement and in order to protect against Amarillo losses, would obtain assignment of Whidbey Island profits and would secure whatever other assets of the joint venturers might be available. With this understanding, Roberts assumed that the future acts of American would be directed toward a protection against and reduction of Amarillo losses and based upon these discussions and understandings and the conduct of Bennett at that meeting, Roberts further asumed that there was nothing more he could do except await the completion of the Amarillo project and a determination of its final losses, if any, after American had secured and applied thereto other assets of the joint venturers and Whidbey Island profits. In fact, all concerned at the meeting felt that these would be sufficient to relieve Roberts of anl ultimate liability.

It is not contended that American initially had any "duty" to marshal the additional security, however, having agreed to do so, and having actually obtained such security, it did have a duty to properly apply the same to Amarillo losses.

The conduct of American, acting through its agent Bennett, was certainly such as to lull Roberts into a false sense of security and mislead him, to his prejudice, in light of subsequent activities on the part of American. Certainly on the basis of the clear understanding that American would carry the burden with regard to the Amarillo project and the protection against accruing losses thereat, including marshaling of assets, he had the right to assume as he did.

It is immaterial that Bennett, at the time of the meeting, had no intent to deceive Roberts and was acting entirely in good faith. The subsequent act of American in obtaining a pledge of the Vitt assets specifically for application first to non-existent losses on the Whidbey Island project, when Amarillo losses then exceeded $600,000.00 and in doing this purposely to prevent Roberts from having them applied as offsets to Amarillo losses, amounted to a constructive fraud on Roberts, and American, under the doctrine of equitable estoppel, was properly prevented by the court from such misapplication of assets.

The doctrine of estoppel should further be applied to American when we recall that it accepted Roberts' indemnification initially on the clearly stated condition that the joint venturers' assets would be for his protection in event of loss. Had American any reservations in this regard then was the time to have made them known. By acquiescing in Roberts' requirement concerning this matter and accepting his indemnification on that clearly stated position, Ameri-

can's subsequent conduct becomes doubly unconscionable. Any claim that Vitt had a right to violate his written obligations in this regard should be viewed in the same light.

It would seem that if there is any warranted circumstance for the application of the equitable doctrine of estoppel, it should be applied here. American's conduct in this case, in agreeing to obtain additional security from the joint venturers to apply against Amarillo losses and then applying that security to its own benefit and Roberts' prejudice was unjust, inequitable, reprehensible and actually borders on downright dishonesty. Small wonder appellees claimed absolvement from *any* liability in this case.

Equally, under the general laws of indemnification, their liability should be reduced, as it was, if not totally cancelled.

An indemnitee owes a duty to the indemnitor to act in such a way as to protect the indemnitor to the extent that it was reasonable to do so under the circumstances (*Union Oil Company of California v. Lull,* 349 Pac. 2d 243, 250).

This duty arises not from any contract but from the equities of the situation (*Union Oil Company of California v. Lull,* supra; *Stearns, Law of Suretyship,* 5th Ed., 105, 106).

Any act on the part of the indemnitee which partially increases the risk or liability of the indemnitor, or otherwise injures or prejudices his rights and

remedies, discharges the indemnitor under the contract of indemnity (42 C.J.S. 634; *Hiern v. St. Paul-Mercury Indemnity Co.,* 262 Fed. 2d 526; *U. S. Fidelity and Guaranty Co. v. Putfark,* 158 So. 9).

The rule as outlined in *Hiern v. St. Paul-Mercury Indemnity Co.* has been heretofore recognized by the District Court for the District of Idaho (*U. S. v. Firemen's Fund Ins. Co.,* 191 Fed. Sup. 317). The trial judge did not therein apply the rule however, because the circumstances of the case did not require its application. Therein, the indemnitor agreed to indemnify up to $24,000.00 and the bonding company increased the bond without notifying the indemnitor. While recognizing the general rule stated in *Hiern,* the trial judge held that it need not be applied since the bonding company was seeking only $24,000.00 from its indemnitor and the increase of the bond without notice to the indemnitor was not prejudicial nor had it increased his risk.

In the case of *Providence Fall River and H. S. Co. v. Massachusetts Bay S. S. Corp.,* 38 Fed. 2d 674, a bond was obtained on the purchase of a ship guaranteeing the seller be saved harmless from all liens which might accrue before complete payment was made on the vessel by the buyer. A purchase money mortgage was given the seller but he failed to record it. Various liens subsequently attached and the seller sought protection under the bond. The court found that he could have recorded the mortgage and protected against those liens which were thus filed and when he

failed to record his mortgage and permitted the liens to become attached to the vessel, he prejudiced the rights of the surety and increased its risk and the surety was therefore absolved from payment and liability.

A guarantor or indemnitor is entitled to the benefit of the securities which the creditor holds and when the creditor voluntarily diminishes the value of the security, the gurantor or indemnitor is discharged pro tanto (*Boorstein v. Miller,* 3 Atl. 837).

The court will readily discern from the cases that bad faith on the part of the indemnitee is not a necessary element of the above stated doctrines. Its obvious presence in this case however makes their application even more compelling.

Furthemore, under the terms of Exhibit 1, appellees were subrogated to all rights of American under the joint venturers' bond applications and indemnity agreements (Exhibits 1, D, E, and F) and all terms of the bond applications, which include American's right to additional collateral security, were deemed to be for the benefit of appellees (Defs. Ex. 1).

There is no question but that the acts of American in wrongfully diverting to its own benefit $350,000.00 of collateral security resulted in direct financial loss to appellees and increased their risk and prejudiced their position. Appellants, rather than appealing from the court's allowance of this set-off, should feel fortunate that appellees were not relieved of liability

in toto. The conduct of appellants would have amply warranted such a result and the $350,000.00 set-off allowed by the court should be sustained.

Dated, Boise, Idaho,
September 19, 1963.

Respectfully submitted,
SAMUEL KAUFMAN of
ANDERSON, KAUFMAN AND ANDERSON,
Attorneys for Appellees.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

SAMUEL KAUFMAN,
Attorney for Appellees.

(Appendices A, B and C Follow)

Appendices.

Appendix A

PERTINENT PORTIONS OF ORIGINAL COMPLAINT

FIRST COUNT

"19. In partial discharge and partial performance of plaintiff's obligation under the bonds referred to in paragraph 12 hereof, in order to procure completion of said project, plaintiff expended as of November, 1959, the aggregate sum of $580,102.72 and became obligated to pay additional moneys to certain subcontractors and suppliers of material, which latter obligations are now being audited and, to the extent of liability of plaintiffs in the premises, processed for payment."

"22. Since November of 1959, plaintiffs have been required to expend and have paid the aggregate sum of $86,340.56 to subcontractors and materialmen whose obligations have heretofore matured under the respective payment bonds, dual obligee, referred to in paragraph 12 hereof. Plaintiffs are now engaged in auditing and processing claims of other suppliers of labor and material with respect to which, as and when liability of plaintiffs has matured or if such liability does mature under any of the bonds referred to in paragraph 12 hereof, plaintiffs reserve any and all of their respective rights and remedies against defendants and each and every thereof."

"24. In addition to the payments made by plaintiffs as hereinabove more particularly set forth and plaintiffs' other obligations under said bonds as same

may be finally adjudicated and determined, plaintiffs have incurred attorneys' fees, auditors' charges, investigation charges, etc., the precise total amount of which is not yet known, and plaintiffs will be liable for additional moneys and additional attorneys' fees and other charges as a result of the aforesaid default of defendants for which said respective defendants are obligated to plaintiffs as is more particularly set forth in the respective agreements of indemnity referred to in paragraphs 13 and 14 hereof."

"27. Wherefore, plaintiffs demand judgment against defendants, V. A. Roberts and Ellen M. Roberts on the First Count of Complaint at this time in the sum of $666,443.28."

SECOND COUNT

"32. Wherefore, plaintiffs demand judgment against defendants, V. A. Roberts and Ellen M. Roberts on the Second Count of Complaint at this time in the sum of $666,443.28."

PRAYER

"(a) Judgment at this time in the sum of $666,443.28, against V. A. Roberts and Ellen M. Roberts under First and Second Counts hereof, with interest and costs of suit;"

Appendix B

MEMORANDUM OF AGREEMENT

WHEREAS as the result of litigation pending in the United States District Court for the District of Idaho, Southern Division, wherein American Casualty Company of Reading, Pennsylvania, and General Reinsurance Corporation are plaintiffs, and V. A. Roberts and Ellen N. Roberts, V. O. Stringfellow, Burl Johnson and Darlene Johnson, K. H. Vitt and Katherine Vitt, and Stringfellow Amarillo Associates are defendants, attorneys for American Casualty Company, V. A. Roberts and Ellen N. Roberts, Burl Johnson and Darlene Johnson, and K. H. Vitt and Katherine Vitt, and K. H. Vitt, met in Amarillo, Texas, on the 12th day of June, 1961, for the purpose of making an examination of the records of Burke, Rowe & Co., Certified Public Accountants, to determine the items and amounts of money paid by American Casualty under its bond obligations for completion of Capehart Housing Projects at Amarillo Air Force Base, Amarillo, Texas, for and on behalf of Stringfellow Amarillo Associates and the individual partners or joint venturers thereof and,

WHEREAS the total amount claimed to have been expended by American Casualty Company for this purpose approximates $1,099,000.00 of which sum certain particular items have been questioned by attorneys for V. A. and Ellen Roberts and other items, particularly administrative expenses, have been questioned by all of the parties; and,

WHEREAS with the exception of the questions above referred to, all other payments made by American Casualty Company for the above stated purpose appear to be properly identified and reasonable and necessary expenditures made pursuant to its bond obligations for the purpose of completing said Capehart Housing Project at Amarillo Air Force Base.

Now therefore it is hereby agreed that the total amount paid or to be paid by American Casualty Company and/or General Reinsurance Corporation for the purpose of completing the Capehart Housing Project at Amarillo Air Force Base under bond obligations subject to additions and credits as hereinafter stated is the sum of $1,025,868.63, and the reasonableness, necessity and identification of this amount or any particular items making up this amount is hereby waived.

ADDITIONS:

There may be added to the above stated amount such sum as American Casualty Company may be required to pay to the United States of America for the use and benefit of Reeves Company, a corporation, and/or the Celotex Corporation on behalf of Stringfellow Amarillo Associates and/or Stringfellow, Johnson, or Vitt to satisfy any judgment which may be obtained against the said Stringfellow Amarillo Associates and/or Stringfellow, Johnson, and Vitt, in a case now pending in the District Court for the Northern District of Texas, Amarillo Division, Case Num-

ber 2813, the approximate contingent amount of which possible judgment is $23,350.00.

No other additions shall be made to the above stated amount of $1,025,868.63 with the possible addition of the Reeves Company or Celotex Corporation claim, such sum being the total and complete sum paid or to be paid by American Casualty Company and/or General Reinsurance Corporation for the completion of the Amarillo projects.

CREDITS:

There will be credited against the above stated sum such monies as may be received from the United States government or any department, agency, or agent thereof, on pending claims for additional work or monies due on the Amarillo projects, specific reference being made to the sum of approximately $100,000.00 which the government or proper agent thereof has apparently agreed to pay and the further sum of approximately $214,000.00 which is pending.

All parties defendant reserve the right to claim against the American Casualty Company and/or General Reinsurance Corporation any other set-offs or credits or reserve rights to raise any defenses relative to his or their obligations or liabilities to Roberts or American Casualty Company, other than as to gross amount above computed, it being the specific intention hereof to agree to a final amount reasonably and necessarily paid by American Casualty Company for the purpose of completing the Capehart Housing Projects at Amarillo Air Force Base, without re-

quirements on its part to further prove or identify this sum or any item thereof or to prove the reasonableness or necessity therefor and to fix and determine the amounts so paid out of pocket.

DATED this 13th day of June, 1961.

(This agreement is entered into for the purpose of inclusion in a pre-trial order.)

American Casualty Company
and
General Reinsurance Corporation
by
Willis C. Moffat
its attorney

V. A. and Ellen N. Roberts
by
Samuel Kaufman, Jr.
their attorney

Burl Johnson and Darlene Johnson
by
Carl D. Hall, Jr.
their attorney

K. H. Vitt
K. H. Vitt
(Does not constitute an appearance in any action)

Approved:
V. O. Stringfellow

Approved:
Burl Johnson

Appendix C

In the United States District Court
for the District of Idaho,
Southern Division

No. 3589

The American Casualty Company of Reading, Pennsylvania,
and
General Reinsurance Corporation,
Plaintiffs,
vs.
Idaho First National Bank, National Association, Executor of the Estate of V. A. Roberts, Deceased, and Ellen M. Roberts, V. O. Stringfellow, Burl A. Johnson and K. H. Vitt, individually and doing business under the firm name and style of Stringfellow Amarillo Associates, Darleen M. Johnson and Catherine Vitt,
Defendants.

Memorandum Opinion

Clark, Chief Judge.

This case is submitted to the Court for determination upon the records and files of the Court, including

the Pre-trial Order as amended and the depositions and exhibits admitted in evidence on stipulation of the parties. Each of the parties have submitted briefs.

Agreed facts have been stipulated by parties hereto in the Pre-trial Order on file herein, as well as the contentions of the parties, which the Court incorporates and makes a part of this Memorandum Opinion the same as if they were set forth at length herein, together with all amendments thereto.

During the pendency of this action V. A. Roberts died and the Idaho First National Bank, Executor of the Estate of V. A. Roberts, was substituted as party defendant, and there is no dispute but what proper claims were filed in due time, which were rejected by the Executor.

Under the Pre-trial Order as amended, and in accordance with the stipulation of the parties, the Court finds that the Plaintiffs are entitled to judgment against V. O. Stringfellow and Burl A. Johnson in the sum of $1,049,218.63, the sum stipulated to have been necessarily and reasonably expended by American in the performance of the obligation under the bond.

This leaves the only question for determination the amount, if any, of the liability of the Executor of the Estate of V. A. Roberts and the liability, if any, of Ellen M. Roberts.

The Court will first dispose of the question as to the liability of Ellen M. Roberts. The Court finds that Ellen M. Roberts is the wife of V. A. Roberts (de-

ceased), and that the execution of the indemnity agreement by defendant, Ellen M. Roberts, was in no sense for her own personal use or benefit or made in connection with, or for the benefit of, her separate estate or property, and judgment will not be allowed against Ellen M. Roberts separately, and judgment will run only to the community assets and not to her separate assets.

This leaves the one question, is the defendant executor of the Estate of V. A. Roberts, entitled to any offset as to the stipulated amount of $1,049,218.63, expended by American under the bond.

It would appear from the record and depositions that American was under an obligation to marshal the assets of the joint venturers, V. O. Stringfellow, Burl A. Johnson and K. H. Vitt, for the protection of both American and Roberts on the Amarillo job. These assets should have been applied to Amarillo losses. The equipment and assets of the joint venturers were assigned to American. It is difficult to determine the exact amount to be applied in the reduction of the claim against Roberts. However, it would seem that the amount of $1,049,218.63 should be reduced by the sum of $350,000.00, securities pledged that should have been credited on the loss on the Amarillo project and the sum of $30,000.00, which the Court finds as the value of the equipment and assets of the joint-venturers; and the Court so finds and judgment against the estate of V. A. Roberts is granted in the sum of $669,218.63.

On the Cross-complaint judgment will be granted against V. A. Stringfellow and Burl A. Johnson in like amount. Attorney fees are allowed Plaintiff in the sum of $15,000.00, and a like amount to Roberts Estate on the Cross-complaint.

It should be noted that there are claims still pending. If the amounts, or any part thereof, are collected the estate of Roberts should be credited therewith.

Counsel for Plaintiffs may prepare Findings of Fact, Conclusions of Law and Judgment in accordance with the opinion of the Court herein.